COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP365-CR **Cir. Ct. No. 2003CF1333**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE LOMELI-LOZANO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Jose Lomeli-Lozano pled guilty to two counts of first-degree sexual assault of a child. On the first count, the circuit court imposed a twenty-year prison sentence, with Lozano to serve a minimum of ten years in initial confinement. The circuit court imposed a consecutive ten-year prison

sentence on the second count, with Lozano to serve a minimum of five years in initial confinement. Lozano filed a postconviction motion seeking sentence modification, arguing that the circuit court erroneously exercised discretion when it failed to give adequate consideration to a defense-commissioned psychological evaluation that addressed Lozano's actions and future dangerousness. The circuit court denied the motion and Lozano appeals. We conclude that the circuit court properly exercised sentencing discretion and we therefore affirm the judgment of conviction and postconviction order.

¶2 The relevant facts underlying this appeal are, for the most part, undisputed. Lozano came from Mexico to the Milwaukee area as an undocumented worker. He planned to stay five years, and he sent most of the money he earned back to his wife and children in Mexico.

¶3 Lozano, however, became romantically involved with a woman who had two nieces, both aged seven- to eight-years old. Occasionally, when one of the girls was visiting their aunt, Lozano would engage the girl in sexual activity. According to both girls, Lozano started by rubbing their buttocks. Lozano admitted that, over a period of approximately two years, he engaged in numerous sexual encounters with one of the girls. His activities included placing his finger in the girl's vagina, placing his penis in or on the girl's buttocks, forcing the girl's mouth onto his penis, and placing the girl's hand inside his pants and having her rub his penis until he ejaculated. As to the other girl, Lozano admitted that he had touched the girl's "private parts" and that he had ejaculated on her buttocks.

¶4 After he pled guilty, the circuit court ordered a presentence investigation report prepared. For his part, Lozano commissioned a psychological examination and "defense-based presentence investigation report." Dr. Robert R.

Alvarez, a professor at the Medical College of Wisconsin in the Department of Psychiatry and Behavioral Medicine, examined Lozano and reviewed the complaint and other case history. Dr. Alvarez concluded that Lozano suffered from mild clinical depression. He reported that the results of various psychological tests indicated that Lozano ranked relatively low on the psychopathy scale, exhibited "occasional impulsiveness," and that Lozano's offenses seemed to "best fit a situational case." Dr. Alvarez opined that on a test assessing future risk of recidivism, Lozano scored "at a very low felony re-offense risk." For these and many other reasons, Dr. Alvarez recommended probation for Lozano "in connection with a formal psychotherapy program," and a sex-offender treatment plan.

¶5 At sentencing, the circuit court stated that it had reviewed Dr. Alvarez's report and it was "not of the same opinion as Dr. Alvarez." Noting that Dr. Alvarez, as a psychologist, could give "wonderful tests and actuarials and predict what's going to happen in the future," including that "Mr. Lozan[o] is never going to do this again," the circuit court indicated that it could not, given the seriousness of Lozano's offenses and the chance Lozano could re-offend, place him "on probation out in the community." The circuit court opined that it did not believe it possible to predict future dangerousness. It noted that it considered Lozano a pedophile because his offenses occurred and recurred over an extended period of time. Lozano's offenses did not, the circuit court stated, involve "a slip of the hand" or "[doing] something stupid one night." Instead, they involved the "methodical, ongoing molestation of these girls."

¶6 After the circuit court imposed the prison sentences outlined above, Lozano filed a postconviction motion seeking sentence modification. He contended in his motion that the circuit court had erroneously exercised discretion

by failing to give adequate weight and consideration to Dr. Alvarez's assessment. He also contended that the circuit court's reasoning was internally inconsistent, for example by opining that future dangerousness could not be predicted, and yet predicting Lozano's future dangerousness by stating that, if released on probation, Lozano would, in all likelihood, "go and molest other kids." The circuit court denied the motion, reasoning that Dr. Alvarez's report was an opinion that it was not required to "view … as concrete fact." The court noted that it based Lozano's sentences on the appropriate sentencing factors, "not on an opinion predicting the defendant's future behavior." It further reasoned that Dr. Alvarez's report focused on the need for community protection, but did not take into account the need for punishment of Lozano and general deterrence of crimes like Lozano's. Lozano appeals.

¶7 The standard of appellate review is well-settled. The circuit court has great discretion in imposing sentence. *See*, *e.g.*, ***State v. Wickstrom***, 118 Wis. 2d 339, 354-55, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the circuit court if the facts of record indicate that the circuit court "engaged in a process of reasoning based on legally relevant factors." *See* ***id***. at 355 (citations omitted). The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). This court will sustain a circuit court's exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). This court is extremely reluctant to interfere with the circuit court's sentencing discretion given the circuit court's advantage in considering the relevant

sentencing factors and the demeanor of the defendant in each case. *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Even in instances where a sentencing judge fails to properly exercise discretion, this court will "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶8 In ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, the supreme court reaffirmed the ***McCleary*** sentencing analysis, which cited the importance of the sentencing court's consideration of "the nature of the offense, the character of the offender, and the protection of the public interest." ***McCleary***, 49 Wis. 2d at 274 (citation omitted). ***McCleary*** also emphasized the importance of the sentencing court's exercise of discretion.

> It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed.
>
> In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards…. [T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

Id. at 277 (citation omitted).

¶9 ***Gallion*** requires the trial court to explain the "linkage" between the sentence and the sentencing objectives. ***Gallion***, 270 Wis. 2d 535, ¶46. Although the standard of review did not change, "appellate courts are required to more closely scrutinize the record to ensure that 'discretion was in fact exercised and the

basis of that exercise of discretion [is] set forth.'" ***Id.,*** ¶76 (quoting ***McCleary***, 49 Wis. 2d at 277).

¶10 Lozano argues that resentencing is required because the circuit court erroneously exercised its discretion by arbitrarily declining to consider Dr. Alvarez's report, which was he contends, contains reliable and relevant information. In support, Lozano notes that ***Gallion*** – which requires sentencing based on "complete and accurate information … reached by an organized framework for the exercise of discretion," ***id.***, ¶36, required a more nuanced sentencing analysis than the one reflected in the sentencing transcript.

¶11 Although the ***Gallion*** standard technically does not apply to this case,[1] we are satisfied that the circuit court's sentencing remarks nonetheless meet that standard. The circuit court discussed the main ***McCleary*** factors and specifically applied them to the facts of this case. The circuit court indicated that the seriousness of Lozano's offenses – which occurred repeatedly and over an extended period of time - and the possibility that he might re-offend required the imposition of substantial prison sentences. It also indicated the importance of demonstrating to the public that offenses such as Lozano's would be severely punished. Thus, the circuit court gave the greatest weight to the seriousness of the offenses and the need for deterrence and public protection.

¶12 In regard to the defense presentence report and the circuit court's decision to afford it little weight, we note that it is clear the circuit court read and

[1] Lozano was sentenced ten months prior to the release of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The supreme court indicated that ***Gallion*** applied to future cases only. ***Id.***, ¶8.

gave serious consideration to the report, but did not believe the recommendations were realistic given the possibility of future criminal behavior by Lozano. As the State notes, a presentence report is just one relevant factor to consider at sentencing, *see* ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41, and a defense presentence report does not share even the status of a court-ordered presentence report, s*ee* ***State v. Greve***, 2004 WI 69, ¶28, 272 Wis. 2d 444, 681 N.W.2d 479 (defense sentencing memorandum to be afforded less status than a court-ordered presentence investigation report primarily because the document is a defense-advocacy document and may not serve the public interest). The minimal weight assigned to Dr. Alvarez's report was well within the circuit court's discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.